

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

Supreme Court U. S.  
OCTOBER TERM, 1975

APR 9 1976

MICHAEL RODAK, JR., CLERK

No. 75-1153

D. LOUIS ABOOD, *et al.*

*Appellants.*

v.

DETROIT BOARD OF EDUCATION, *et al.*

*Appellees.*

CHRISTINE WARCZAK, *et al.*

*Appellants.*

v.

DETROIT BOARD OF EDUCATION, *et al.*

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

**APPELLANTS' BRIEF IN OPPOSITION  
TO MOTION TO DISMISS OR AFFIRM**

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While Appellant Teachers' position on the merits is adequately set forth in our Jurisdictional Statement, we think it desirable to reply briefly to Appellees' assertion that this appeal lacks a substantial federal question.

## ARGUMENT

1. Appellees assert that this appeal lacks a substantial federal question because the claim here is indistinguishable from that in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). To state that proposition is not to demonstrate it.

The state statute upheld by the Michigan Court of Appeals against federal constitutional challenge expressly authorizes state agencies to force public employees to make financial contributions to unions as a condition of public employment. The ruling law is that *public employment* is constitutionally protected against employment practices which abridge First Amendment rights of speech and association. *E.g.*, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). These precedents have been uniformly understood by the federal courts to mean that no state or local government may by either statute or administrative action discharge a public employee because he has seen fit to join a union.<sup>1</sup> *E.g.*, *A.F.S.C.M.E. v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

All of these cases stand for the same proposition: conditioning public employment on a waiver by the employee of his right of free association is unconstitu-

tional. *But this is the law only in the public sector.* A private employer has a common law right to discharge its employees at will. *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 324 (1972); *Monaghan v. Central Vt. Ry.*, 404 F. Supp. 683, 686 (D. Mass. 1975). Ever since its decision in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), where this Court was unanimous on the point, see 245 U.S. at 271-72 (Brandeis, Holmes & Clarke, JJ., dissenting), it has been understood that private employment — in the absence of positive state action — may constitutionally be conditioned upon waivers by employees of their speech and associational rights. “[I]t is black letter law that purely private restrictions on the right of free speech are not prohibited in many circumstances where the First Amendment would forbid similar interference by the Government.” *Holodnak v. Avco Corp.*, 514 F.2d 285, 292 (2d Cir. 1975).

Thus, there is nothing novel about the *Hanson* ruling, *insofar as it is confined to the private sector.* It merely established that, on the bare record before the Court, there was nothing unconstitutional in a federal statute authorizing private employers to condition *private* employment on a waiver of the right not to associate with a labor union — a condition which private employers could constitutionally impose at common law. *Hitchman*, 245 U.S. at 250-51.

However, “the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.” *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961); cf. *Evans v. Newton*, 382 U.S. 296, 298-300 (1966). The basic error made by the Michigan Court of

<sup>1</sup>If the right of free association is abridged when a public employee is discharged for joining a union, parity of reasoning requires that discharging him for refusing to join or to contribute financial support to a union be regarded as an equal abridgment. *Jurisdictional Statement* at 18-19.

Appeals is that it extended the *Hanson* ruling to the public sector, where it conflicts with the more recent rulings of this Court and of the inferior federal courts concerning the constitutional rights of public employees. This Court must pass in a plenary way on the decision of the Michigan Court of Appeals because that decision completely ignored the implications of *Pickering*, *Keyishian*, *A.F.S.C.M.E. v. Woodward*, etc. Indeed, the Court of Appeals did not see fit even to mention these later decisions despite their importance and their relevance. Instead, it erroneously chose to rely exclusively on *Hanson* — as do Appellees for their Motion to Dismiss or Affirm — a case of no relevance whatsoever to the constitutional rights of public employees or to the constitutional limitations upon government employers.

Appellees further assert that *Hanson* is applicable here because for constitutional purposes public sector collective bargaining is indistinguishable from private sector collective bargaining. Yet they cite absolutely no authority for their argument that bargaining in the public sector is not a political process. Appellees apparently would have this Court overlook the body of scholarly and judicial opinion which, with rare unanimity, views "collective bargaining" by public employees as "an integral part of the political process, a procedure for reaching a political decision," Summers, *Public Employee Bargaining: A Political Perspective*, 83 *Yale L.J.* 1156, 1197 (1974). See the cases and other authorities cited in the Jurisdictional Statement at 16-17. Appellants also call the Court's attention to, e.g., D. Stanley, *Managing Local Government Under Union Pressure* 1, 20, 24 (1972); H. Wellington & R. Winter, *The Unions and the Cities* 21-30 (1971); Anderson,

*Strikes and Impasse Resolution in Public Employment*, 67 *Mich. L. Rev.* 943, 953-54 (1969); Project, *Collective Bargaining and Politics in Public Employment* (pt. 4), 19 *U.C.L.A. L. Rev.* 887, 1010, 1011-1019 (1972).

2. Appellees read the decision of the Court of Appeals as construing the Michigan statute "to assure that objecting public employees need not support political activities with which they disagree\*\*\*," Motion to Dismiss or Affirm at 5 & n.2, and conclude that therefore Appellants' challenge to the statute on the ground that it permits the use of nonunion employees' coerced fees for political and other noncollective bargaining purposes does not raise a substantial federal question. This gloss is amazing in view of the Michigan Court's clear holding that the statute "does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, [and] sanctions the use of nonunion members' fees for purposes other than collective bargaining." 230 N.W. 2d at 326 (App. A at 18a) (emphasis added). The Court below did not read any right to object to political spending or administrative "restitutionary remedy" into the statute, it merely discussed *in dicta* possible judicial remedies for constitutional violations which it erroneously held Appellants could not assert due to a purported *lack of standing*. *Id.* at 327 (App. A at 20a-21a). This error raises a substantial federal question for the reasons stated in the Jurisdictional Statement at 20-27.

Appellees are also wide of the mark in suggesting that the decision below was grounded upon the view that Appellant Teachers had not pursued a remedy afforded by state law for the vindication of their

federal constitutional rights. The Court of Appeals' holding that in order to preserve First Amendment rights a public employee must plead that he has specifically protested to the union the expenditure of his funds for political purposes to which he objects was based, not on any Michigan constitutional, statutory, administrative or judicial rule of law, but on that Court's (erroneous) reading of *International Association of Machinists v. Street*, 367 U.S. 740 (1961).<sup>2</sup> See 230 N.W. 2d at 327 (App. A at 19a-21a). Nor do Appellees point to any such state rule. In any case, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is *itself* ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969) (emphasis added); accord, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525 (1959); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *First National Bank v. Anderson*, 269 U.S. 341, 345-46 (1926); *Carter v. Texas*, 177 U.S. 442, 447 (1900).

Finally, Appellees' assertion that there could be no damage to Appellants in requiring them to follow the Court of Appeals' suggested "restitutionary remedy" is without merit. If the decision of the Court below is not reversed, Appellant Teachers would have to make "service fee" payments, or suffer discharge, and make known to the union the political causes to which they

<sup>2</sup> Appellees' reference to a "belated effort" to challenge this holding is puzzling in view of the fact that Appellants have maintained that it was erroneous at all stages of the proceedings below. *See, e.g.* Brief in Support of Application for Rehearing at 5-14 (Mich. Ct. App., Apr. 18, 1975); Application for Leave to Appeal at 45 (Mich. Sup. Ct., Jun. 3, 1975).

object, and only *then* seek restitution from the union itself "of any funds expended for such causes." Motion to Dismiss or Affirm at 7 (emphasis added).<sup>3</sup> Once Appellants' coerced funds have been expended for political causes, the harm done is *irreparable*. See *Cort v. Ash*, 422 U.S. 66, \_\_\_, 95 S. Ct. 2080, 2091 (1975).

<sup>3</sup> In point of fact, Appellants' Complaint in *Abood* was filed *after* the "agency shop" clause went into effect. The *Abood* plaintiffs alleged that Appellee Detroit Federation of Teachers had requested their discharge and that Appellee Board of Education had threatened them with discharge. *Abood* Complaint, Count I ¶¶12-13. Under the duress and misrepresentations of repeated threats of discharge from the Board and Federation, certain of the Appellant Teachers later involuntarily paid "service fees" under protest in the belief that such payments were necessary to maintain their employment. Supplemental Memorandum in Opposition to the Federation's Suggestion of Partial Mootness at 4-9, and attached Affidavits (Mich. Ct. App., Sept. 17, 1974).

Furthermore, regardless of the status of Appellants' offer of proof (which Appellants do not concede is outside the record here), the Complaints alleged that the Federation spends a substantial portion of the monies collected under the "agency shop" clause on noncollective bargaining matters of which Appellants do not approve. *Abood* Complaint, Count II ¶4; *Warczak* Amended Complaint ¶13. The well-settled Michigan rule is that on an appeal of a dismissal for failure to state a cause of action all factual allegations in the complaint are assumed to be true and viewed in the light most favorable to the plaintiffs. *Bieski v. Wolverine Insurance Co.*, 379 Mich. 280, 150 N.W. 2d 788 (1967); *Schuh v. Schuh*, 368 Mich. 568, 118 N.W. 2d 694 (1962). In any case, here the Court of Appeals judicially noticed that a portion of every union's budget is spent on political activities. 230 N.W. 2d at 326 (App. A at 18a).

## CONCLUSION

As demonstrated in the Jurisdictional Statement, the issues presented on this appeal have not, as Appellees assert, been disposed of by the *Hanson* and *Street* cases. In any event, this Court has consistently held that an appellee's motion to dismiss an appeal or affirm the judgment on the ground that the question has been settled by prior decisions of this Court will be denied where the question presented "is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring any further consideration." *Alton R.R. v. Illinois Commerce Commission*, 305 U.S. 548, 550 (1939). Accordingly, it is respectfully submitted that the Motion to Affirm or Dismiss should be denied and that probable jurisdiction should be noted.

Respectfully submitted,

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